Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

RAYMOND RYAN, Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT FOR THE SECOND DISTRICT

PETITION FOR WRIT OF CERTIORARI

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45 pp

QUESTIONS PRESENTED

1. Whether a Motion to Dismiss an Indictment with Prejudice acts as an acquittal barring reprosecution of a defendant under the Fifth Amendment of the United States Constitution.

2. Whether a trial court dismissal of an indictment on the court's own motion acts as a bar to reprosecution of a defendant under the Fifth Amendment of the United States Constitution.

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OPINIONS BELOW

The opinion of the Illinois Appellate Court for the Second District is reported at 259 Ill. App. 3d, 611, 631 N.E. 2d 348,197, Ill. `Dec. 345, (Ill. App. 2d Dist. 1994) and is reprinted in the appendix at page A19.

The opinion of the Illinois Supreme Court denying the petition for leave to appeal has not been reported. It is reprinted in the appendix at page A40.

JURISDICTION

On March 21, 1994, the Illinois Appellate Court for the Second District, reversed and remanded the the Circuit Court of Winnebago County decision to dismiss the indictment against defendant, Raymond Ryan on the grounds of double jeopardy. A petition for leave to appeal to the Illinois Supreme Court was denied on October 6, 1994. No rehearing was sought. Jurisdiction of this court is invoked pursuant to 28 U.S.C. Section

1257 and Benton v. Maryland, 395 U.S. 784, 23 L. Ed. 2d 707, 89 S.Ct. 2056 (1969).

STATUTE INVOLVED

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases of arising in the land or naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

United States Constitution Amendment V.

STATEMENT OF THE CASE

Petitioner, Raymond Ryan was charged in a two count indictment in 90 CF 451 with theft. The trial commenced on July 15, 1991

in the Circuit Court of Winnebago County, Rockford, Illinois, before the Honorable David F. Smith. A jury was impaneled and sworn. The State presented its opening statement. The State presented its first witness. Subsequent to the direct testimony of the State's witness, Ryan filed a Motion to Dismiss Count I and II of the Bill of Indictment. The trial court heard arguments from Ryan's counsel and the State on the Motion to Dismiss. The State sought leave to amend the Bill of Indictment which was subsequently denied by the Court. The Court also denied the Motion to Dismiss. The State sought leave to continue with testimony. Ryan objected and sought a response from the State as to whether the trial was proceeding on both counts of the indictment. The State advised the Court that it was not prepared to dismiss either count and did not seek a continuance. Ryan advised the Court that prejudice would

result to him if the trial continued. The Court denied the Motion to Dismiss. The State advised the Court and Ryan that no stigma attached to Ryan if testimony continued. The Court again denied the Motion to Dismiss.

The first witness completed cross-examination and the State proceeded with a direct examination of a second witness. Prior to a noon recess, the State moved for a dismissal of Count I of the Bill of Indictment. Upon returning from the noon recess, the Court decided to review its prior ruling. The Court granted the State's Motion to Dismiss Count I of the Bill of Indictment. The Court dismissed Count II of the Bill of Indictment. Bond money posted in the matter was later returned to Ryan.

Ryan was subsequently reindicted in a one count bill of indictment alleging the same factual basis to support the charge of theft. Ryan filed a Motion to Dismiss the indictment

alleging a violation of the double jeopardy clause of the Fifth Amendment of the United States Constitution. The Court heard arguments on the Motion to Dismiss. The Honorable Harris H. Agnew ultimately ruled Count II of the original indictment was dismissed with prejudice. Judge Agnew found this dismissal with prejudice was a final and appealable order. The State filed a Motion to Reconsider. Judge Agnew held the prosecution of Ryan was barred because jeopardy had attached.

The State filed an Appeal to the Illinois Appellate Court Second District. The response to this Appeal by Ryan alleged that under the double jeopardy provisions of the Fifth Amendment, reprosecution of Ryan was barred when the original indictment was dismissed with prejudice and when the Court on its own initiative dismissed the Bill of Indictment. The appellate court held in its

decision on March 21, 1994 that the dismissal of the Bill of Indictment was not with prejudice. The appellate court held that the trial court did not dismiss the Bill of Indictment on its own motion, but rather on Ryan's motion, thereby no bar to reprosecution existed. The appellate court further held double jeopardy did not attach when Ryan failed to withdraw the motion or seek a continuance. Leave to appeal to the Illinois Supreme Court was denied.

ARGUMENT

I.

The Illinois Appellate Court's decision, finding of no dismissal with prejudice, is in direct contradiction to the protection afforded by the double jeopardy provisions of the Fifth Amendment.

The protections afforded by the Constitutional guarantees of the Fifth Amendment prohibit a second prosecution

after an acquittal, after a conviction and multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 89 S.Ct. 2072 (1969). The most fundamental rule found in the history of the double jeopardy clause has been that a verdict of acquittal could not be reviewed on error or otherwise without putting a defendant twice in jeopardy and thereby violating the Constitution. United States v. Martin Linens Supply Co., 430 U.S. 564, 571, 51 L. Ed. 2d 642, 97 S.Ct. 1349 (1977). What constitutes an acquittal for double jeopardy purposes has had a long struggle with the courts. In the present case, the Illinois Appellate Court held the dismissal with prejudice sought by Ryan does not act as an acquittal. This narrow interpretation by the Illinois Appellate Court contradicts the protections afforded by the double jeopardy

clause of the Fifth Amendment and deserves this Court's attention.

The Illinois Appellate Court agrees that a dismissal with prejudice under Illinois law constitutes an adjudication on the merits of the case which is conclusive of the rights of the parties and in a criminal context is tantamount to an acquittal. People v. Creek, 94 Ill. 2d 526, 531-33 (1983). If there is an acquittal, the constitutional guarantee against double jeopardy bars a second prosecution on the same charge after acquittal. Illinois v. Vitale, 447 U.S. 410, 415, 65 L. Ed. 2d 228, 100 S.Ct. 2260 (1980). The policies underlying the double jeopardy clause are to protect the accused from the risk, financial expense and emotional burden that a criminal trial represents to the accused. Arizona v. Washington, 434 U.S. 497, 503, 54 L. Ed. 2d 717 98 S.Ct. 824 (1978). Clearly this policy means the government should only have one

opportunity to convict an accused. When this opportunity for a conviction terminates in a final judgment favorable to the accused, any retrial was barred. Lee v. United States, 432, U.S. 23, 30, 53 L. Ed. 2d 80, 97 S.Ct. 2141 (1977). This basic principle of double jeopardy applies not only to acquittals based on a verdict of a jury, but also to acquittals entered by the trial judge following the presentation of evidence, but before verdict. United States v. Scott, 437 U.S. 82, 93 57 L. Ed. 2d 65, 98 S.Ct. 2187 (1978).

In the present case, the Illinois Appellate Court's decision was based on its interpretation of several factors. These factors include only an oral announcement that the motion was being granted and the charges dismissed. The Illinois Appellate Court further held the context in which the Order was announced and the argument of the issue shows there was no intent to dismiss

the Bill of Indictment with prejudice. This narrow focus by the Illinois Appellate Court ignores the holding of People v. Creek, 94 Ill. 2d 526, (1986). In Creek, the Illinois Supreme Court held a purposeful inclusion of the phrase "with prejudice" indicates an intention to terminate the proceeding in defendant's favor in such a way as to bar further prosecution. Id at 531-33. The Illinois Appellate Court decision has ignored the purposeful inclusion by Ryan of the phrase "with prejudice". The holding of Creek is also on point with the present case in that no evidence need be presented for a court to consider a dismissal with prejudice. Clearly, Creek stands for the basic principle of double jeopardy, that an acquittal operates as a bar to a reprosecution. This principle also allows the government to protect its interest by the adversarial role it has in the criminal proceeding. As long as the government is

present, as in Creek, and participates in the process, the court must assume there is an acquiescence on the part of the government to the proceedings. In the present situation no dispute exists that the State had a copy of Ryan's motion. No dispute exists that the State was aware of the contents of Ryan's motion. No dispute exists that the State made no objection to granting of Ryan's motion. No dispute exists that the State made no objection to the return of the bond money. These factors when viewed as a whole, clearly show an acquiescence on the part of the State as to a dismissal with prejudice. This dismissal with prejudice acts as a final judgment. A final judgment acts as a bar to reprosecution under the double jeopardy clause of the Fifth Amendment of the United States Constitution. Clearly, a termination that was favorable to Ryan, thereby acting as a bar to a reprosecution occurred.

In Fong Foo v. United States, 369 U.S. 141, 143, 7 L. Ed. 2d 629, 82 S.Ct. 671 (1962), this Court held that "for however egregious the error of the acquittal, the termination favorable to the accused has been regarded as no different from a fact finders acquittal that resulted from errors of the trial judge." The dismissal with prejudice of Ryan's indictment, even if in error by the trial court, acts as a final judgment barring reprosecution.

II.

The trial court dismissal of an indictment acts as a bar to reprosecution of a defendant under the Fifth Amendment of the United States Constitution when there is no manifest necessity for the dismissal.

This Court has held that in considering double jeopardy, each case must turn on its own facts. Downum v. United States, 372 U.S. 734, 737, 10 L. Ed. 2d 100, 83 S.Ct. 1033 (1963). The starting point for any double

(1963). The starting point for any double jeopardy determination is whether the jury has been impaneled and sworn. Serfass v. United States, 420 U.S. 377, 388, 43 L. Ed. 265, 95 S.Ct. 1055 (1975). In the present case, there exists no dispute that a jury had been impaneled and sworn. Once a reviewing court has ascertained double jeopardy may bar reprosecution, it must look at the facts of each case. Double jeopardy protection does not require a jury to render a verdict, rather the risk of jeopardy means a risk of determination of guilt has occurred. Serfass, 400 U.S. et 391. In Illinois, courts have interpreted this risk of jeopardy to be some proceedings whereby an attempt by the State to convict a defendant has occurred. People v. Deems, 81 Ill. 2d 384, 389 (1980). Ordinarily a defendant's motion for a mistrial removes any barrier to a reprosecution even if the defendant's motion is necessitated by a

prosecutorial or judicial error. United States v. Scott, 437 U.S. 82, 93 57 L. Ed. 2d 65, 98 S.Ct. 2187 (1978).

In the present case, Ryan filed a Motion to Dismiss the indictment. Ryan by filing the motion was, at that point, waiving any double jeopardy bar to reprosecution. The Illinois Appellate Court decision was in agreement with this principle. The Illinois Appellate Court though, has misconstrued another important principle of double jeopardy. When a court acting without the defendant's consent aborts the proceedings, the defendant has been deprived of his valued right to have his trial completed by a particular tribunal. United States v. Scott, 437 U.S. at 99. In the present case, the waiver of double jeopardy occurred when the motion was filed. Upon denial by the Court on three separate occasions, double jeopardy protection of Ryan again commenced. The State had two

witnesses testify. Ryan was an active participant in the trial at that point by participating in the cross-examination of these witnesses. These facts are clearly different from the facts in two similar cases. In Lee v. United States, 432 U.S. 23, 26, 53 L. Ed. 80, 97 S.Ct. 2141 (19), the defendant presented no defense. In Illinois v. Somerville, 410 U.S. 458, 459, 35 L. Ed. 2d 425, 93 S. Ct. 1066 (1973), no evidence was presented by the State.

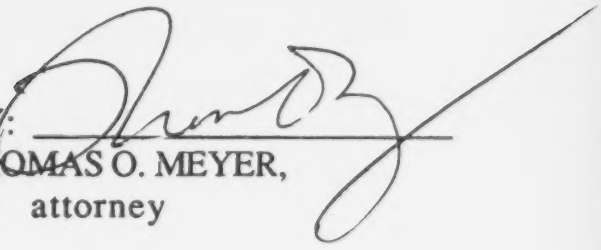
The Illinois Appellate Court's focus on Ryan's failure to request a continuance ignores the objections raised by Ryan as to going forward with the trial. Further, unlike Lee, the record does not reflect the Court intended to review the Motion to Dismiss filed by Ryan. While clearly, a trial court has some discretion in its ability to dismiss an indictment, there must be a manifest necessity for a dismissal. United States v.

Dinitz, 424 U.S. 600, 607 47 L. Ed. 2d 267, 96 S.Ct. 1075 (1976). The trial court's options at that time included ordering a continuance to allow the State to research the issue, advising Ryan it was denying the motion because of no opportunity to research the issue, or taking the issue under advisement in order to allow for further argument. As the record reflects, none of these options were chosen. The State proceeded with putting on testimony and factual allegations. A risk of determination of guilt occurred. The Illinois Appellate Court's inference that Ryan's motion to dismiss was still pending is not supported by the record. Rather, the record supports the inference that Ryan intended to have the question of his guilt or innocence determined by this jury. The Court on its own motion dismissed the Bill of Indictment without Ryan's consent. No manifest necessity existed for the dismissal of the indictment at that time.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted.

Respectfully submitted,
RAYMOND RYAN, Petitioner



BY: _____
THOMAS O. MEYER,
his attorney

APPENDIX

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Illinois Appellate Court for the Second District

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THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. RAYMOND RYAN, Defendant-Appellee

SECOND DISTRICT NO. 2-92-0397

Reversed and remanded.

Opinion filed march 21, 1994

1. CRIMINAL LAW-*dismissal with prejudice constitutes adjudication on merits tantamount to acquittal-theft.* A dismissal with prejudice constitutes an adjudication on the merits which is conclusive of the rights of the parties, and in a criminal case it is tantamount to an acquittal which bars a second prosecution under the constitutional guarantee against double jeopardy.

2. CRIMINAL LAW-*record did not support defendant's claim that dismissal was with prejudice.* Despite the fact that the defendant's motion sought the dismissal of the charges against him "with prejudice," there was nothing in

the record to support defendant's claim that the trial judge's order granting the defendant's motion was intended to be a final adjudication on the merits which would bar reindictment under double jeopardy, especially where the trial judge's remarks preceding his ruling indicated that he was concerned with the infirmities in the charges against the defendant rather than the merits, and the defendant did not dispute the fact that his motion was granted because of the defects in one count of the indictment.

3. CRIMINAL LAW-*no double jeopardy bar existed to reindictment where record showed defendant chose to end proceedings on basis of defective indictment.* Despite the defendant's attempts to show that the dismissal of the indictment against him was a result of the court's own initiative, the record

showed the defendant elected not to continue the proceedings on the basis of the defect in the indictment, and therefore, absent a dismissal resulting from a judgment that the defendant could never again be prosecuted, there was no double jeopardy bar to the defendant's reindictment.

Appeal from the Circuit Court of Winnebago County; the Hon. Harris H. Agnew, Judge, presiding.

Paul A. Logli, State's Attorney, of Rockford, (F.James Brun V, Assistant State's Attorney, and William L. Browers and Cynthia N. Schneider, both of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

Thomas O. Meyer and Timothy F. Horning, both of Meyer & Associates, Rockford, for appellee.

JUSTICE BOWMAN delivered the opinion of the court:

After the trial in this case started, defendant, Raymond Ryan, moved to dismiss the indictment. The trial court granted the motion because of defects in the indictment, and defendant was subsequently reindicted. The issue raised is whether the reindictment violated constitutional protections against double jeopardy.

Defendant was charged by indictment with two counts of theft. Count I alleged that the property taken had a value in excess of $100,000, and count II alleged a property value in excess of $10,000. After the jury was sworn and

testimony began, the defendant moved to dismiss both counts, contending that the indictments were defective because they alleged values over $100,000 and $10,000 while the statutes that designated those values as greater felony classifications were not enacted until after the crime was committed. A motion by the prosecutor for leave to amend the bill of indictment was denied, as was defendant's motion to dismiss, and the trial continued with cross-examination of the first witness and direct examination of of a second witness. The prosecutor then moved to dismiss count I and proceed on count II. Following a recess, the trial judge, Judge Smith, again considered the parties' motions. Ultimately finding that there was no statute to support count II and that there was merit in defendant's position, the court granted

both parties' motions and dismissed the charges.

The State subsequently secured a one-count reindictment of defendant. With the exception of the dollar amount, the new indictment alleged precisely the same basic facts as had been alleged in both count I and count II of the earlier indictment. The sole count of the new indictment asserted a value in excess of $300. This new dollar amount brought the charge into conformity with the statute effective at the time of the offense. (Ill. Rev. Stat. 1983, ch. 38, pars. 16-1(a)(1),(e)(3)(now codified, as amended, at 720 ILCS 5/16-1(a)(4)(A), (b)(4) (West 1992)).) The new case was assigned to Judge Agnew. Defendant against moved to dismiss, asserting that further prosecution was violative of the double jeopardy clause. Finding that Judge

Smith had dismissed court II of the earlier case with prejudice, Judge Agnew ruled that the dismissal was a final order and that jeopardy had attached. Accordingly, he granted defendant's motion and dismissed the case.

The State moved for reconsideration, but Judge Agnew denied the motion, stating as grounds that the original indictments had been valid; that the original prosecution, therefore, had been terminated improperly; and that the matter could not now be reprosecuted. The State timely filed this appeal.

The State first contends Judge Agnew erred in finding that Judge Smith dismissed the earlier case with prejudice. While defendant's motion sought dismissal "with prejudice," Judge Smith did not use those words in orally announcing his decision. He merely

granted the motion and added that "[t]he charges are dismissed." Defendant posits essentially that, since his motion requested dismissal with prejudice, and Judge Smith granted the motion and returned his bond money, the case was dismissed with prejudice. We disagree.

•1 A dismissal with prejudice constitutes an adjudication on the merits of the case which is conclusive of the rights of the parties and, in a criminal context, is tantamount to an acquittal. (*People v. Creek* (1983), 94 Ill. 2d 526, 531-33.) The constitutional guarantee against double jeopardy provides protection against a second prosecution on the same charge after acquittal. (*People v. Stefan* (1992), 146 Ill. 2d 324,333, citing *Illinois v. Vitale* (1980), 447 U.S. 410, 415, 65 L. Ed.2d 288, 235, 100 S. Ct. 2260, 2264; *Creek*,

94 Ill. 2d at 532.) These rules leave no doubt that, if Judge Smith dismissed count II of the original indictment with prejudice, double jeopardy indeed barred the reindictment of defendant. The record, however, does not reflect that the dismissal was with prejudice.

First of all, despite defendant's clear motion for relief "with prejudice," the trial court's oral pronouncement merely stated that the charges were dismissed. Judge Smith did not specify that he dismissed with prejudice. Nor is there a written order showing the nature of the dismissal. It appears no separate order was entered into the record. The State cites to a document labeled "Witness and Jury Record" which contains the only written reference to the dismissal that we have been able to find. It states only, [c]ase dismissed, jury

discharged," and speaks nothing of a dismissal with prejudice. All in all, the record of the trial court's order, on its face, cuts against defendant's argument.

Even if we look beyond the actual pronouncement made by the court, we find little support for defendant's position. A trial court order is to be interpreted in its entirety, taking into consideration other parts of the record, including the pleadings, the motions before the court, and the issues to be decided. (*Granville Beach Condominium Association v. Granville Beach Condominiums, Inc.* (1992), 227 Ill. App. 3d 715, 720; *City of Chicago v. American National Bank & Trust Co.*(1988),171 Ill. App. 3d 680, 687.) An order should be construed reasonably so as to give effect to the discernible intent of the court. (*Granville Beach,* 227 Ill. App. 3d at

720; *Baldi v. Chicago Title & Trust Co.*(1983), 113 Ill. App. 3d 29, 33.) We have carefully examined the transcript of the arguments and discussions between the court and both counsel regarding defendant's motion to dismiss. Without exception those discussions related to the defects in the bill of indictment. They revealed issues such as which statute controlled, whether the State could amend the indictment, and whether the State could proceed on both or only one count or could proceed at all. It is clear to us that the issues drawn, and the context in which the order was announced, had nothing to do with the merits of the case.

The remarks preceding his ruling are also persuasive that when Judge Smith dismissed the case he was concerned with the infirmities in the charges against

defendant rather than the merits. The judge stated: "The Motion is to proceed on Count II of the Indictment as it is alleged now. I think that's a statute that does not exist at this time. I feel the Defendant's position has merit here and I grant...the Defendant's Motion to Dismiss." Even defendant does not dispute that the trial court granted his motion to dismiss because of the defects in count II of the indictment.

•2 Collectively, the context in which the trial judge ruled, the issues he was deciding, and the judge's own observations about the defendant's motion demonstrate that he did not intend his order to be a final adjudication on the merits, amounting to an acquittal of defendant. In fact, we see nothing in the record to show that the dismissal was with prejudice, except for the motion

itself. While defendant no doubt intended that the charges could be dismissed with prejudice, that is not enough for us to find that, in fact, they were so dismissed. Since the order did not amount to an acquittal, it did not bar the reindictment of defendant on the same charge.

•3 The State next attacks Judge Agnew's ruling, made upon reconsideration, that reprosecution was barred because the original indictments had been valid and, therefore, were wrongly dismissed in the first proceeding. The court relied on section 3-4(a)(3) of the Criminal Code of 1961 (Ill. Rev. Stat. 1989, ch. 38, par. 3-4(a)(3) (now 720 ILCS 5/3-4(a)(3) (West 1992))), which states in pertinent part:

> "A prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon

> the same fact, if such former prosecution:
>
> * * *
>
> (3) Was terminated improperly after the jury was inpaneled and sworn***"

Focusing on the undisputed fact that the jury had been impaneled and sworn, the defendant insists he could not be reprosecuted. However, in light of other undisputed facts, defendant cannot succeed on this argument.

It is true that in a jury trial jeopardy attaches when a jury is impaneled and sworn. (*Serfass v. United States* (1975), 420 U.S. 377, 388, 43 L. Ed. 2d 265, 274, 95 S. Ct. 1055, 1062; *People v. Jackson*,(1987), 118 Ill. 2d 179, 188, *rev'd on ground People v. Stefan* (1992), 146 Ill. 2d 324.) However, it is also true that double jeopardy is not implicated where, as here, the defendant himself sought to have his trial terminated without any

submission of the issue of guilt or innocence to a fact finder. (*United States v. Scott* (1978), 437 U.S. 82, 57 L. Ed. 2d 65, 98 S. Ct. 2187.) A motion by the defendant for a mistrial "is deemed to be a deliberate election on his part to forego his valued right to have his guilt or innocence determined before the first trier of fact." (*Scott*, 437 U.S. at 93, 57 L. Ed. 2d at 76, 98 S. Ct. at 2195.) Such a motion by the defendant is generally considered to remove the double jeopardy bar, and the State may reprosecute even when the error that prompted the motion is attributable to the State. (*People v. Williams* (1984), 130 Ill. App. 3d 11, 14-15.) In this case, it was the defendant who moved to dismiss before the matter of his guilt or innocence had been decided.

In a case very similar to this one *Lee v. United States* (1977), 432 U.S. 23, 53 L. Ed. 2d 80, 97 S. Ct. 2141, the defendant moved to dismiss the information after the prosecutor's opening statement in a bench trial. The trial court tentatively denied the motion subject to further study, and the two-hour trial continued, with the State presenting the testimony of two witnesses. After the conclusion of the State's case and a 15-minute recess, the defense rested without presenting any evidence. The trial court then grant the motion to dismiss, without making any determination as to defendant's guilt or innocence. In holding that the defendant could be tried again, the *Lee* court first made clear that on the facts of the case it did not matter whether the lower court had dismissed the charge, as opposed to

declaring a mistrial. The court said that, as in cases involving a mistrial, it was evident the dismissal was predicated merely on a prosecutorial error, rather than any judgment that defendant could never be prosecuted for the same offense. Thus, the dismissal did not contemplate an end to all prosecution of the defendant for the offense charged. On the contrary, it had been granted with the expectation of a second prosecution. Hence, even though defendant had moved for a dismissal, the *Lee* court relied on the principle, cited above, that a motion by the defendant for a mistrial is generally assumed to remove any barrier to reprosecution. Noting the last-minute timing of the defendant's motion and counsel's failure to request a continuance or otherwise inform the court of the importance of not being placed in

jeopardy on a defective charge, the court held that the retrial of the defendant did not violate double jeopardy principles. Like the defendant in *Lee*, defendant here moved for dismissal after the trial had begun and testimony had been taken. Dismissal ultimately was granted based on the defective indictment, and no determination of defendant's guilt or innocence was ever made. We think it was apparent from the court's remarks when it first denied defendant's motion that it would reconsider the motion later. Still defense counsel neither withdrew the motion nor requested a continuance in order to avoid the likelihood of being placed in jeopardy. On these facts, double jeopardy was not a bar to a retrial.

Defendant's attempts to attribute the dismissal to the trial court's own initiative are unavailing. The record is compelling on this point. It is apparent the trial court initially denied the defendant's request because it believed the State was entitled to an opportunity to examine the statutory discrepancies raised by the motion to dismiss. Thus, it was clear the court would consider the motion again, at a later time. Just prior to the noon recess the State, having reviewed the statutes, moved to dismiss court I. The court then recessed, leaving the State's motion, as well as a number of other matters, unresolved. After the recess, the court summarized the events of the morning and heard further argument as to whether the State should be allowed to proceed. Indicating that it felt "the Defendant's

position has merit her," the court granted, first the State's motion dismissing count I, and then defendant's motion as count II. This sequence of events leaves no doubt in our minds that the court acted on defendant's motion, not it own initiative.

It does not matter that the trial had reached a point where jeopardy had attached, or that the charges were erroneously dismissed in the first trial. Defendant chose not to continue the proceedings before the first trier of fact. Moreover, he chose to end those proceedings on the basis of an error by the prosecutor. Absent a dismissal resulting from a judgment that he could never again be prosecuted, there was no double jeopardy bar to his reindictment.

For the reasons set forth above, the orders of the Winnebago County circuit

court, dismissing case No. 91-CF-1331, are reversed, and the matter is remanded for further proceedings.

Reversed and remanded.

McLAREN and COLWELL, JJ., concur.

77148

ILLINOIS SUPREME COURT
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OCTOBER 6, 1994

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No. 77148 - People State of Illinois, respondent, v. Raymond Ryan, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1994.